91-1094

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAIME FIGUEROA-SOTO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was investigated by federal agencies as part of a joint federal/state Task Force. To avoid Speedy Trial Act problems, the Task Force chose to prosecute petitioner in Arizona State Court, and deputized the state prosecutor as a special AUSA. The fruits of federal subpoenas, federal search warrants, federal grand jury proceedings, federal wiretaps, federal seizures, federal witness cooperation agreements and the federal witness protection program were used to conduct the state prosecution. Federal DEA agents were the lead investigators and trial representatives. Attendance of witnesses and production of evidence in state court was compelled pursuant to federal DEA subpoenas. Petitioner was convicted and imprisoned in Arizona. After his state conviction, the United States indicted petitioner for federal crimes virtually identical to the Arizona charges. He is being prosecuted by the same special AUSA that prosecuted him in the state case.

The question presented is whether petitioner's indictment should be dismissed on Fifth Amendment double jeopardy grounds, pursuant to the exception to the dual sovereignty principle of *Bartkus v. Illinois*, 359 U.S. 121 (1959), where one prosecution is carried out as a "tool" or "instrumentality" of another sovereign.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

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Jaime Figueroa-Soto petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on July 11, 1991, in the appeal entitled *United States v. Jaime Figueroa-Soto*.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 938 F.2d 1015, and is reprinted in Appendix A, p.1a through 10a, *infra*. The decision of the United States District Court for the District of Arizona (Browning, D.J.) was in the form of an order without opinion and has not been reported. The order is reprinted in Appendix A, p. 12a, *infra*.

JURISDICTION

On May 30, 1990, the United States brought a criminal indictment against petitioner in the United States District Court for the District of Arizona. On October 23, 1990, the district court denied petitioner's motion to dismiss his federal prosecution on the grounds of double jeopardy. Upon interlocutory appeal of this decision, the Court of Appeals for the Ninth Circuit entered judgment July 11, 1991, affirming the district court's denial of petitioner's motion. Petitioner timely filed a petition for rehearing, dated August 22, 1991, which was denied on October 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> ". . .; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

STATEMENT OF THE CASE

Petitioner stands charged with several narcotics related offenses under a federal indictment resulting from an investigation that began when an Organzied Crime Drug Enforcement Task Force ("Task Force") targeted petitioner after narcotics were found in coordinated searches by federal and state officials of residence in Tucson, Arizona. RT,[1] Sept. 28, 1990, p. 15, lines 2-18; p. 32, line 25, p. 34, lines 1-3. The Task Force consisted of state and federal enforcement personnel, combined according to guidelines, rules, and regulations promulgated by the United States Justice Department. Pursuant to those orders, guidelines, rules, and regulation, the investigation was coordinated by the DEA and supervised by the United

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[1] Reference to Reporter's Transcript of Double Jeopardy hearings hereafter referred to as "RT".

States Attorney. The Task Force is a formal and sustained endeavor to maximize the effectiveness of the law enforcement agencies of the respective governments. Its genesis arose from the recognition that conventional cooperation between state, local and federal law enforcement agencies was ineffective in fighting narcotics trafficking. *See* Guidelines for the Drug Enforcement [Task Forces] January 1983.[2]

The investigation and prosecution of petitioner has been substantially an effort of the United States Government, although evidence gathered by the United States, compelled by its subpoena, search, seizure, court and grand jury processes, and analyzed, organized and presented by agents of the United States, was first used to guide and support a successful prosecution of petitioner in the Arizona Superior Courts. There he was convicted of illegally conducting an enterprise and money laundering, and was sentenced to 30½ years imprisonment. This conviction embraced the narcotics allegations for which the Government now seeks to convict petitioner. Virtually identical narcotics offenses charged against petitioner in separate indictments by the State of Arizona were dismissed as barred under double jeopardy grounds.

The Task Force investigation of petitioner began in 1984 and continued throughout the following years, leading to his arrest in May 1988 by federal authorities for state prosecution. It included Title VII wiretaps, obtained under the judicial authority of the United States District Court, and carried out by United States DEA agents.

The investigation made use of the coercive power of a lengthy prison sentence imposed by the district court

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[2] This report and the "guidelines and summary" reports cited herein below are periodical materials available in most libraries. Most of these materials were furnished to the Clerk of the Ninth Circuit Court for its convenience and are also lodged with the clerk of this court for its consideration in connection with this petition.

upon another suspect, Soto-Leal, to induce cooperation from him with agents of the DEA, against petitioner. RT, Sept. 28, 1990, p. 15-16, lines 24-5. After petitioner-er's state conviction and before his federal indictment, Soto-Leal's forty-five year prison term was reduced on motion of the Federal Government in April 1990, essentially to time served, in return for that cooperation. RT, Oct. 2, 1990, p. 42, lines 14-25; p. 43, lines 6-14. Moreover, Soto-Leal and his family were granted immigration to and residence in the United States and placed in the Federal Witness Protection Program. RT, Sept. 28, 1990, p. 66, lines 19-22; p. 67, lines 15-3.

The investigation against petitioner included availment of a grand jury of the United States to hear testimony of witnesses and gather other evidence. RT, Sept. 28, 1990, p. 25, lines 15-16; p. 26, lines 1-4, 16-21. It made use of fruits of searches carried out under the authority of United States search and civil seizure warrants. RT, Sept. 28, 1990, p. 48, lines 2-7.

The Task Force investigation of petitioner was headed first by AUSA Roll and then by AUSA Stevens. On two separate occasions, Task Force agents sought to convince Stevens to accept prosecution of petitioner, but were declined, and encouraged to seek further proofs to bolster the case. RT, Oct. 1, 1990, p. 106, lines 13-17. It was such a declination of prosecution that prompted the second wiretap directed against petitioner in 1987. RT, Oct. 1, 1990, p. 44, lines 6-10; p. 108, lines 1-6.

While the Task Force investigation was in progress, the State of Arizona became interested in commencing a murder case against other individuals believed to be associated with petitioner. Federal Task Force participants were concerned that petitioner might flee if the State charged its murder suspects. RT, Oct. 1, 1990, p. 96, lines 18-20. They again presented their case to AUSA Stevens. Stevens believed the investigation was incomplete and wanted more time and investigation. He told

the agents that this added investigation could not be accomplished after a federal arrest because of the Speedy Trial Act. The agents wished to protect their four-year investigation and thus presented their case to the state prosecutor. RT, Sept. 28, 1990, p. 58, lines 17-20. The DEA Task Force members, after consultation with AUSA Stevens, determined that the state court was the best forum at that time for its presentation. To accomplish this Task Force goal, the State agreed to serve as prosecuting agency with the Task Force providing all the material it had gained and all the support necessary for the prosecution. RT, Sept. 28, 1990, p. 48, lines 3-8. The Arizona courts applied a more relaxed speedy trial guarantee than governs United States Courts under the Speedy Trial Act, 18 U.S.C. 3161 et seq.

The state court prosecution of petitioner was significantly accomplished, supported and effected, if not controlled, by instrumentalities both persons and processes of the United States. The lead, or responsible agents who worked with the assistant Arizona Attorney General who prosecuted petitioner in Arizona Superior Court, were Drug Enforcement Administration Agents Roger Wallace and David Garcia. RT, Sept. 28, 1990, p. 54-55, lines 6-24. Petitioner's state court arrest warrant was supported by the affidavits of Wallace and Garcia. RT, Sept. 28, 1990, p. 52, lines 10-13. Their work included attendance at the Arizona Superior Court trial and all pre- and post-trial motions, with Wallace sitting at counsel table during the trial as the responsible agent, exempt from Ariz. R. Evid. 615, excluding witnesses. RT, Sept. 28, 1990, p. 53, lines 14-16. Wallace and Garcia participated extensively in plea bargain meetings and negotiations involving prosecutor Davis and petitioner's lawyer. RT, Sept. 28, 1990, p. 63-64, lines 22-3.

Witnesses were compelled to give testimony in the state court by subpoenas of the United States, which had been issued by United States DEA agents purportedly under the authority of 21 U.S.C. 876. RT, Sept. 28, 1990, p.

68-69, lines 21-14; p. 69-70, lines 24-3. The prosecutor was allowed to prepare for the state court proceeding by having access to transcripts of witnesses who had testified before the United States Grand Jury. RT, Sept. 28, 1990, p. 47-48, lines 21-7.

While the Arizona Superior Court action was pending, the United States Attorney moved to stay a pending federal civil forfeiture action against petitioner, in order to preclude its use by petitioner as a discovery tool to prepare his defense of the Arizona State Court case. RT, Sept. 28, 1990, p. 65, lines 15-22.

Assistant Arizona Attorney General John Davis, the lead prosecutor and trial lawyer against petitioner in the Arizona prosecution, was deputized a special Assistant United States Attorney, while the Arizona Superior Court prosecutions were in process. RT, Sept. 28, 1990, p. 76, lines 9-20; RT, Oct. 2, 1990, p. 63-65, lines 4-6. Throughout the course of the state court proceeding, both before and after he was deputized a special Assistant United States Attorney, prosecutor Davis coordinated his Arizona prosecution with Task Force leader, Assistant United States Attorney Stevens. RT, Oct. 2, 1990, p. 64, lines 11-13. After petitioner was federally indicted, Mr. Davis though continuing on the payroll of the Arizona Attorney General, became deeply involved as co-prosecutor with Stevens in petitioner's prosecution in the district court, even while he represented the State of Arizona in petitioner's state court appeals.

The district court denied petitioner's motion to dismiss the indictment of these federal charges, brought on the grounds of the Fifth Amendment's guarantee against double jeopardy. Petitioner argued that the deep involvement in, and virtual control of, the state court prosecution by the federal government, invoked the exception to the dual sovereignty principle of *Bartkus v. Illinois*, 359 U.S. 121 (1959), for situations where prosecution by one sov-

ereign is a sham or cover for the other, or when the prosecuting agency was a tool or instrumentality for the other.[3]

On appeal, the Ninth Circuit affirmed. Its opinion recited many of the details of federal involvement in the state prosecution, set forth above. It specifically recognized the fact that Task Force representatives were dissuaded from a prosecution in the United States District Court, and promoted and agreed upon an Arizona State Court prosecution, in order to avoid Speedy Trial Act problems that would arise if petitioner were then indicted, when additional time would have to pass to permit further investigation of petitioner. Conceding that, pursuant to this agreement, the DEA and other federal agencies' information "was brought to the state agencies, all intelligence, all ledgers, documents, everything was brought to the state to assist in the prosecution," App. A at 4a, the court concluded that, measured against the amount of involvement reported in *Bartkus*, there was no showing that this case presented sufficient evidence of the state prosecution being "merely a tool of the federal authorities" nor did it "sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution . . ." App. A p. 7a citing *Bartkus*, 359 U.S. at 123, 124. The Ninth Circuit thought that what it was faced with in this case was no more than "a conventional practice" with which the *Bartkus* court had been faced. It therefore found "no constitutional barrier." App. A p. 9a-10a. The Ninth Circuit did not consider or discuss the impact of the Task

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[3] The District Court had been asked by the government to make a finding that petitioner's motion was "frivolous and dilatory", a technical jurisdictional determination that might have enabled the prosecution of petitioner to proceed without waiting for a Ninth Circuit resolution of the double jeopardy appeal. *See, United States v. Dunbar*, 611 F.2d 985 (5th Cir. 1980). Though the Ninth Circuit thought otherwise, see App. A p. 10a, *infra*, it made no such finding, because the request was presented at a time when the District Court had no jurisdiction to enter such an order.

Force concept on a "conventional cooperation" analysis under *Bartkus*.

The court cited but did not discuss its own governing case on the appropriate test for the *Bartkus* exception, e.g. *United States v. Bernhardt*, 831 F.2d 181 (9th Cir. 1987). Nor did it discuss any of the other opinions attempting to assess the proper test and standard of proof for recognizing the *Bartkus* exception. E.g. *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1979) ("Federal authorities cannot be allowed to circumvent the speedy trial requirements of the Sixth Amendment by manipulating the state criminal processes before the initiation of federal prosecutorial proceedings"); *United States v. Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984) (the "somewhat amorphous contours of this qualification."); *United States v. Davis*, 906 F.2d 829, 834 (7th Cir. 1990) (Irving Kaufman, J.) (Some cases emphasize that a "sham and cover must be shown" while others require only that there be shown "active participation by the federal government").

REASONS FOR GRANTING THE WRIT

THIS CASE, CLEARLY SHOWING INTENSIVE FEDERAL INVOLVEMENT IN A STATE PROSECUTION; CARRIED OUT WITH FEDERAL PROCESSES AND PROCEDURES; INITIATED TO AVOID FEDERAL SPEEDY TRIAL PROBLEMS; PRESENTS THE ISSUE OF THE MEANING OF THE *BARTKUS* "SHAM" OR "TOOL" EXCEPTION TO DUAL SOVEREIGNTY DOUBLE JEOPARDY LAW; ABOUT WHICH ISSUE THE COURTS OF APPEAL DISAGREE AS TO ITS EXISTENCE, AND THE STANDARD FOR ITS APPLICATION.

This Court has held that a state prosecution does not bar a federal prosecution for the same conduct, if such conduct constitutes an offense under both federal and state law. *Bartkus v. Illinois*, 359 U.S. at 129; *Abbate v. United States*, 359 U.S. 187, 193-194 (1959), quoting

United States v. Lanza, 260 U.S. 377 (1922). Prosecution by both state and federal governments for the same conduct is justified by the "dual sovereignty" doctrine:

> "An offence, in its legal significance, means the transgression of a law. . . . The same act may be an offense or transgression of the laws of both [sovereigns] . . . [B]y one act [an offender] has committed two offenses, for each of which he is justly punishable."

Bartkus, 359 U.S. at 131-132, quoting *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19-20 (1852).

The recognition of dual sovereignty to sanction double conviction and double punishment for the same conduct has not been without controversy, given the intuitive reaction of unfairness produced by the thought of two coordinate branches of what most citizens deem the same government prosecuting and punishing for the same conduct. But full recognition of the concept of dual sovereignty has resulted from concerns that to do otherwise would truly impair each sovereign's ability to meaningfully enforce its own criminal laws.

In *Lanza*, *supra*, *at* 260 U.S. 358, Chief Justice Taft warned that a double jeopardy bar could result in the preemption of federal law by nominal state penalties. Similarly, in *Heath v. Alabama*, 474 U.S. 82 (1985) the Court justified prosecutions under the dual sovereignty doctrine reasoning that application of double jeopardy would deny a sovereign the power to enforce its criminal laws simply because another sovereign won the "race to the courthouse." 474 U.S. at 93. In *Bartkus*, *supra*, Justice Frankfurter was concerned that a federal statute could impose small or nominal penalties in prevention of a State's more severe laws, thereby hampering the objective to maintain peace and order. 349, U.S. at 137. In *Abbate*, *supra*, the Court conversely feared that the State or its agents could interfere with federal law enforcement producing "undesirable consequences." 359 U.S. at 195. Moreover, *Abbate*

feared that procedures to coordinate prosecutorial efforts would be "highly impractical." 359 U.S. at 195.

At the same time, there were expressed concerns that the dual sovereignty concept overbore individual protections inherent in the Fifth Amendment's double jeopardy clause. One such concern is against "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 335 U.S. 184, 187 (1957). *Cf. Bartkus*, 359 U.S. at 168 (Brennan, J., dissenting); *Serfass v. United States*, 420 U.S. 377, 391 (1975). Another recognized reason for the protection against double jeopardy is the bar against the government having an opportunity to "rehearse its presentation of its proof." *Tibbs v. Florida*, 457 U.S. 31, 41 (1982); *Ashe v. Swenson*, 397 U.S. 436, 447 (1970); *Hoag v. New Jersey*, 356 U.S. 464 (1958). An individual can be subject to both of these abuses when multiple prosecutions occur, irrespective of whether technically separate sovereigns prosecute, particularly where, as here, there is a new era of institutionalized, deliberate coordination of investigation and prosecution, amounting to partnerships between States and the United States.

The Task Force concept as it worked in this case[4] is significant because it:

1. Was created in recognition that the "conventional" type of cooperation with which the *Bartkus* court was faced and which was envisioned by the Ninth Circuit was impractical, thus calling for more than mere "conventional practice";

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[4] Petitioner does not contend the Task Force concept is infirm, either in principle or as applied in this case. In fact, the state prosecution epitomizes its concept working at its best. It is only the use of the Task Force to prosecute petitioner twice that he contends is improper.

2. Alleviates the types of feared results of a double jeopardy bar raised in *Lanza*, *Heath*, *Bartkus*, and *Abbate*; and,

3. Brings poignantly to issue the results generated by allowing dual prosecution that the learned justices raised in *Green*, the *Bartkus* dissent, *Serfass*, *Tibbs*, *Ashe* and *Hoag*.

Notwithstanding the doctrine of dual sovereignty, the reprosecution of an accused for the same conduct, by a State after the United States has done so, or by the Government after a State has, is rare and viewed as the exception.[5] *Rinaldi v. United States*, 434 U.S. 22, 28-29 (1977). The Government has a policy against instituting prosecution of one who has already been subject to state court prosecution, without special clearance. *See Petite v. United States*, 361 U.S. 529, 530 (1960) (per curiam); *United States v. Davis*, 906 F.2d 829, 832 (7th Cir. 1990). While these are not laws or precedent upon which an accused like petitioner may rely, they do express the sensitivity of the issue of multiple state/federal prosecutions for the same conduct.

Bartkus recognized the fact that under some circumstances dual sovereignty could not validly shield multiple state federal prosecutions against the Double Jeopardy Clause of the Fifth Amendment (or, at least, for that time, whatever Fourteenth Amendment due process strictures similar to a double jeopardy bar might be found to exist, *e.g. Palko v. Connecticut*, 302 U.S. 319 (1937)). Therefore, the majority opinion in *Bartkus* took cognizance of the potential blurring of fully separate sovereignty, when federal and state officials cooperated. The Court said:

> "The record establishes that the prosecution was undertaken by state prosecuting officials within their

[5] The Task Force phenomenon is likely to change the frequency with which courts may be forced to deal with multiple prosecutions.

> discretionary responsibility and on the basis of evidence that conduct contrary to the penal code of Illinois had occurred within their jurisdiction. It establishes also that federal officials acted in cooperation with state authorities, as is the conventional practice between the two sets of prosecutors throughout the country. It does not support the claim that the State of Illinois in bringing its prosecution was merely a tool of the federal authorities, who thereby avoided the prohibition of the Fifth Amendment against a retrial of a federal prosecution after an acquittal. It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution."

Bartkus, 359 U.S. at 124.

The fact of state/federal cooperation, and the concern for the rightness of the result in *Bartkus* if that involvement were more intensive than normal, obviously prompted the *Bartkus* Court to describe what the circuit and district courts now deal with as the "sham", "tool" or "cover" exception to the dual sovereignty immunity from the strictures of the Double Jeopardy Clause. The issue has spawned extensive litigation. See, *e.g.*, *United States v. Raymer*, 941 F.2d 1031, 1037-1038 (10th Cir. 1991); *United States v. Davis*, 906 F.2d 829, 832-835 (2nd Cir. 1990); *United States v. Paiz*, 905 F.2d 1014, 1023-1024 (7th Cir. 1990); *United States v. Bernhardt*, *supra*, 831 F.2d at 182; *United States v. Moore*, 822 F.2d 35, 38 (8th Cir. 1987); *United States v. Aboumoussallem*, 726 F.2d 906, 910 (2nd Cir. 1984); *United States v. Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 445 U.S. 946, (1980); *United States v. Russotti*, 717 F.2d 27, 30-32 (2d Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976). To petitioner's knowledge, no federal circuit court has ever found the exception applicable to any case. *But cf. Bernhardt*, *supra*. The reason may be in part because no fac-

tual record has approached the extent of purposeful involvement found here, and the uniform rejection of claimed double jeopardy violations may have been appropriate. However, a reading of cases discussing the "sham" or "tool" exception to *Bartkus* also discloses great confusion about what this Court meant when it wrote the above-cited portion of *Bartkus*.

Even within the Ninth Circuit, different approaches to the *Bartkus* test can be found. In *United States v. Richardson*, 580 F.2d 946, 947 (9th Cir. 1978), a panel including then Circuit Judge Kennedy decided the issue by concluding that "the enforcement efforts of the two countries were not so intimately entwined that the defendants might ask us to adopt a rule barring federal prosecution on the ground that the previous foreign trial had been brought by a governmental entity acting solely as an agent of the United States or that the prior prosecution was a cover . . ." *Id.* Subsequently, in what seems to be the Ninth Circuit case most often cited on the issue, *United States v. Bernhardt*, *supra*, 831 F.2d at 182, the question of the existence of the "cover" or "tool" or "sham" exception was noted as in doubt though probable. The Court noted that *Bartkus* does not bar cooperation. It found, however, "more than mere cooperation," and it remanded for further fact finding, suggesting that "sufficient independent federal involvement" would save the prosecution. *Id.* at 183. It is not clear whether a violation would have been found if there were deep involvement and not "mere cooperation" or how federal involvement could be "independent" and in what manner it would thereby save the prosecution from the claim of double jeopardy. *Cf. United States v. Guy*, 903 F.2d 1240 (9th Cir. 1990). Similarly, the opinion below in this case merely cites *Bernhardt*, and concludes that the extensive involvement here did not equal that described by the dissent in *Bartkus*. It contained no other rationale, nor did it discuss what it thought was meant by the *Bernhardt* precedent it applied as controlling.

The Second Circuit merely recited the language from *Bartkus* quoted above, albeit recognizing the "somewhat amorphous contours of this qualification." *United States v. Aboumousallem*, 726 F.2d 906, 910 (2nd Cir. 1984). It then went on to discuss whether proceeding with a state prosecution first, after a joint investigation, to get a harsher sentence, was "manipulating" the state; finding that it was not. *Id.* at 910 n. 3. Presumably an opposite finding would have prompted the court to find a *Bartkus* violation.

Judge Irving Kaufman, writing for the Seventh Circuit in *United States v. Davis*, *supra*, 906 F.2d at 834, reported on two differing general approaches to define the "tool" or "cover" test of *Bartkus*. Assessing *Bartkus* on this point, to decide whether a state court ruling excluding fruits of a search from evidence bound the United States in a subsequent federal prosecution, under the doctrine of collateral estoppel, Judge Kaufman noted that some courts emphasize that there must be found a "sham and cover for federal prosecution", *Id.*, citing e.g., *United States v. Ng*, 699 F.2d 63, 68 (2nd Cir. 1983). He noted that others "only" require a showing that the United States pulled a "laboring oar"; that there be proven "active participation by the federal government." *Id.*, citing e.g., *United States v. Parcel of Land at 5 Bell Rock Road*, 896 F.2d 605 (1st Cir. 1990).

At least two courts have openly questioned the existence of a *Bartkus* exception. *United States v. Paiz*, 905 F.2d 1014 (7th Cir. 1990); *United States v. Patterson*, 809 F.2d 244, 247 n.2 (5th Cir. 1987). Thus, even without Task Force involvement, clarification of the status and requirements of the *Bartkus* exception will alleviate the need for continuous review of the issue, and will greatly aid federal courts in considering claims invoking the exception.

The advent of sustained, intensive, formalized Task Force prosecutions will multiply the occurrences of this

issue, and requires an explication of the *Bartkus* rule. Task Forces have changed conditions from those that were in existence when *Bartkus* was decided. There is a need for a clear rule that accounts for such joint prosecutorial vehicles, but allows for individual double jeopardy protection when the principle of dual sovereignty either does not need vindication under given circumstances, or is being perverted in the unusual case.

The Task Force Program came into being when "the Attorney General recommended to the President that a multi-agency [Task Force] utilizing a broader spectrum of Federal, State, and local criminal justice agencies be authorized to deal with the problem of drug trafficking in the United States." Annual Report of the Organized Crime Drug Enforcement Task Force Program [hereinafter "Report"], March 1984, p. 15. In the process of establishing the Task Force strategy, the Attorney General issued "Guidelines for the Drug Enforcement [Task Force]" [hereinafter "Guidelines"] in January 1983. A specific characteristic of Task Forces is "to work fully and effectively with state and local drug enforcement agencies." Guidelines, p. 2. The 1990 edition of the Guidelines specifically names "state investigators, county/local investigators, state prosecutors and county/local prosecutors" as participants. Guidelines II(C).

The underlying thought of the Task Force Program is to "create a structure that would facilitate numerous agencies acting in concert to attack a common problem." Report 1984, p. 17. "The program uses a consensus approach to investigation and prosecution that pools the strength of participating agencies." National Drug Enforcement Policy Board, National and International Drug Law Enforcement Strategy, January 1987, p. 180. In 1987, the Justice Department published a "Five-Year Summary Report" [hereinafter "Summary Report"] for the years 1983-1987, which stated:

> "[T]he mutual advantages of a Federal-State-local team are many. *Partnership* with the Federal law

> enforcement community provides non-Federal agencies with the capacity to extend investigations outside their normal jurisdictions. As Federal jurisdiction is nationwide, special deputization as a Federal officer and under the supervision of a Federal agency enables members of State and local departments to cross jurisdictional lines in conducting an investigation."

Summary Report, p. 50-51. The reports particularly emphasize the key role of prosecutorial integration.

> "Cases developed by federal, state, and local investigators should be presented in the judicial system best suited to the facts, statutes, sanctions, and space on the court docket. When appropriate, prosecutors in both the state and federal systtems may be cross-designated to participate in prosecutions in each other's jurisdictions.

"Drug Enforcement" Vol. 10, No. 1, p. 13. "By exercising the option of taking a case to a Federal or a State court, the prosecutors can best apply the combined powers of the two systems." Report 1984, p. 37-38. In particular, the Justice Department emphasizes the cross-designation of prosecutors within the Task Force. Report 1984, p. 57. Cross-designation "not only augments the attorney resources that can be brought to bear, it also adds to prosecutiorial flexibility in terms of choices of venues and charges." Report 1985, p. 12. The combination of forces serves to "maintain close working relationships with State prosecutors and decide jointly what kinds of charges to place in State or Federal courts." Report 1984, p. 57. As one state attorney participating in the Task Force Program, cited in the Task Force Report, summarizes:

> "It doesn't matter whether it's Federal or State. We'll be sitting at the trial table, whichever court it goes to."

Report 1984, p. 57.

The essence of the joint Task Force is best described in a letter to President Reagan, dated March 14, 1984, by

United States Attorney General William French Smith, characterizing the Task Force as "*functioning partnerships* between and among Federal, State, and local law enforcement agencies, . . ." Report 1984, Introduction (emphasis supplied).

In Petitioner's case, all the above described advantages and tactics of the Task Force partnership were used to extend the federal investigation and prosecution of petitioner into the state forum. The Task Force employed petitioner's state prosecution as an instrument in order to protect federal interests in prosecuting petitioner. This decision was made because AUSA Stevens feared a successful U.S. prosecution would be hindered by the Federal Speedy Trial Act (18 U.S.C. 3161, et seq.). On the other hand, a prosecution in state court would not be subject to such rigorous time constraints, thus allowing the prosecution to be further developed and refined prior to trial, but after the arrest of petitioner. In this way, the Federal Government manipulated the state criminal process before the initiation of federal prosecutorial proceedings in order to circumvent the speedy trial requirements of the Sixth Amendment and its statutory implementation in form of the Speedy Trial Act. *See United States v. Liddy, supra*, 542 F.2d at 79. ("Federal authorities cannot be allowed to circumvent the speedy trial requirements of the Sixth Amendment by manipulating the state criminal processes before the initiation of federal prosecutorial proceedings").

Symptomatic of the pervasive support of the state trial with the full arsenal of federal prosecutorial means, after the initiation of the state prosecution, DEA subpoenas were used to compel witnesses to testify and or provide evidence. By authority of 21 U.S.C. § 876, the issuance of DEA subpoenas is derived from congressional authority given to the U.S. Attorney General. These subpoenas on their face threaten federal sanctions for nonobedience. Sanctions would be enforced by the U.S. Attorney in federal district court. Thus, the authority of the U.S. Attor-

ney and the federal judiciary was invoked to enforce compliance with DEA subpoenas issued to gather and present evidence in the state prosecutions.

Moreover, the delivery of federal grand jury transcripts to the state prosecutors compellingly demonstrates the integration of state law enforcement and prosecutions with the purposes of the Federal Government. Pursuant to Fed.R.Crim.Proc. 6(e)(3)(A)(ii), disclosure of federal grand jury transcripts, otherwise prohibited by Rule 6, may be made to "such government personnel (including personnel of a state or subdivision of a state) as deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty *to enforce federal criminal law.*" [Emphasis supplied].[6] The advisory committee emphasized that disclosure under the above provision,

> "is permissible only on connection with the attorney for the government's "duty to enforce federal criminal law" and only to those personnel "deemed necessary . . . to assist" in the performance of that duty. Under subdivision (e)(3)(B), the materials disclosed may not be used for any other purpose, . . ."

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[6] Rule 6(e)(3) Federal Rules of Criminal Procedure provides, in part:

> "(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
>
> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.
>
> (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. . . ."

To be complying with the above provision, the Task Force supervising attorney, AUSA Stevens, in initiating petitioner's state prosecution by transferring all federal grand jury transcripts, must have intended the state prosecution to vindicate federal law enforcement interests. However, after those interests were in the process of being vindicated in state court, the Task Force decided to duplicate its impact and punish petitioner twice. Petitioner's state prosecutor, John Davis, had been cross-designated an AUSA, thereby guaranteeing continuity in the joint Task Force prosecutorial effort, and using the state case to hone the evidence for the federal prosecutions. As this court observed in *Montana v. United States*, 440 U.S. 147, 153-155 (1979) and *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486-487 (1910), "the persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be 'strangers to the cause . . . [O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record'." Although these principles originated in a civil context, their rationale holds true in the criminal sphere. *See, United States v. Nasworthy*, 710 F.Supp. 1353, 1355 (S.D. Fla. 1989); *United States v. Davis, supra*, 906 F.2d at 834-835.

It is apparent that concerns expressed in the *Lanza* and *Bartkus* cases about a race to the courthouse between Federal and State Governments; about one sovereign being able to frustrate the other by obtaining a conviction carrying modest punishment; and about successful coordination between federal and state sovereigns of their mutual interests in enforcing criminal laws, simply do not apply to present day Task Force activities. At the same time, the opportunity for "rehearsing proofs" about which the Double Jeopardy Clause is concerned, and for the unfairness and oppression by the same officials and agencies imposing multiple prosecutions, causing repeti-

tive embarrassment, expense, anxiety, and insecurity, against which the Double Jeopardy Clause is intended to protect, are magnified when regularly established federal/state Task Forces fuel prosecutions in the courts of both sovereigns.

The circuit courts are now faced with cases generated from such Task Forces, e.g. *United States v. Davis*, 906 F.2d 829 (7th Cir. 1990). If, as some courts believe, a double jeopardy violation arises when there has been extensive federal involvement, the Double Jeopardy Clause will have to be imposed against the Government in many instances. If the plain meaning of the phrase "one prosecution being the 'tool' of another sovereign" should be the test once again the result should be invalidation of many subsequent prosecutions.

In this state court trial the hand and power of the federal government was everywhere. All that was done was federally driven. The only purely state facets of this prosecution were a state judge presiding in a state courtroom. None of the reported cases present a record coming even close to this level of control. The facts compel a finding that the state prosecution was a "tool" for the Federal Government. By its own actions, the Federal Government in fact overrode the dual sovereignty concept. Therefore, under the plain meaning of the *Bartkus* discussion, the subsequent attempt to reprosecute petitioner with the same people, the same information, and using the same federal processes, must be held barred by the Double Jeopardy Clause.

CONCLUSION

The facts of this case demonstrate that current law enforcement efforts involve, in some instances, more than the type of "conventional practice" addressed in *Bartkus*. This court should grant certiorari, and either clarify *Bartkus* for the circuits, or reaffirm its language by applying it to reverse the court below.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-10557

D.C. No.
CR-89-360-TUC-WBD

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAIME FIGUEROA-SOTO,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge, Presiding

Argued and Submitted
June 11, 1991—San Francisco, California

Filed July 11, 1991

Before: Robert R. Beezer, John T. Noonan, Jr. and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Noonan

Robert J. Hooker, O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, Tucson, Arizona, for the defendant-appellant.

William R. Stevens, Jr., Assistant United States Attorney, Tucson, Arizona, for the plaintiff-appellee.

OPINION

NOONAN, Circuit Judge:

Jaime Figuerora-Soto (Figueroa) makes an interlocutory appeal from an order of the district court holding that his federal prosecution for narcotics offenses does not place him in double jeopardy. We affirm.

JURISDICTION

Jurisdiction for this interlocutory appeal from a ruling on double jeopardy lies with this court. *Abney v. United States*, 431 U.S. 651 (1977).

PROCEEDINGS

In December 1989 Figueroa was tried and convicted in in Pima County Court, Arizona of conducting a criminal enterprise and of money laundering. In 1990 Figueroa was federally indicted and charged with 14 counts of possession of marijuana with intent to distribute; conspiracy to possess with intent to distribute; and a continuing criminal enterprise. The dates during which these crimes allegedly took place overlap with the dates of the crimes of which Figueroa was convicted in Arizona.

Figueroa moved to dismiss the federal prosecution on the grounds of double jeopardy. The district court held an evidentiary hearing, took testimony for three days and then dismissed the motion. Subsequently the district court ruled that the motion was frivolous and dilatory.

Figueroa appeals the dismissal of his motion.

FACTS

The facts relevant to Figueroa's claim of double jeopardy were developed in the hearing before the district

court. In summary, they are as follows: On March 23, 1984 the Pima County Sheriff's Office called Childers and Wallace, two agents of the Drug Enforcement Agency (DEA), to a residence in Tucson, Arizona where marijuana had been discovered. The DEA agents seized approximately twenty tons of marijuana and drug ledgers from this and another Tucson residence. Six persons were arrested, including one Guillermo Soto-Leal. Soto-Leal was subsequently convicted of federal offenses and sentenced to forty-five years in prison. The court informed him that if he cooperated with the federal government in giving information as to others in the organization, his sentence might be reduced. Soto-Leal agreed to cooperate and disclosed to the DEA agents that he was the bookkeeper of the Figueroa smuggling organization. He explained the ledgers and identified the people mentioned in the ledgers. Soto-Leal's family was placed in the Federal Witness Protection Program. His sentence was reduced to six years.

The DEA also investigated one Miguel Torres and found that he and his people had been responsible for transporting marijuana to the Tucson residence where the seizures had been made. In July 1986 Torres and his associates were convicted of federal narcotics offenses. The evidence against Torres as well as Soto's disclosures pointed to the ultimate responsibility of Figueroa. But in order to corroborate the evidence the DEA obtained warrants for wiretapping. The wiretapping went on from October to December 1987.

Meanwhile, in April 1987, two persons were murdered in Pima County. The Pima County Sheriff's Office believed that they were killed when they tried to collect money for the sale of drugs and that Figueroa had ordered the murders. Some of the conversations recorded by the federal wiretap related to this double homicide. Agents of the DEA began to work closely with the Sheriff's Homicide Detail and with Ken Peasley, the Pima County Prosecutor.

When Pima County detectives reached the point where they were ready to indict and arrest two persons (other than Figueroa) for the murders, the detectives and Peasley met with federal prosecutors, including AUSA Stevens. The federal position was that the arrest of the two murder suspects would cause Figueroa to flee to Mexico. The federal position was also that the federal government was not yet ready to charge Figueroa, that it needed more time to get corroborating evidence. If Figueroa were now federally indicated, the Speedy Trial Act would not give the federal government the time to conduct the type of investigation needed. County Prosecutor Peasley indicated that he would be willing to take the drug case "and try to work the homicide as far as the narcotics case was also involved." The federal authorities agreed. As a result of these discussions, according to AUSU Stevens, "everything" that the DEA had "was brought to the state agencies, all intelligence, all ledgers, documents, everythting was brought to the state to assist in the prosecution."

In May 1988 Figueroa was arrested by state officers. At the same time, his house was searched under a federal warrant and $8 million of his assets was seized under federal warrant. Pima County prepared to prosecute him. The Attorney General of Arizona joined the prosecution and was represented by John Davis. According to the federal government's brief on this appeal, DEA agents then worked under the supervision of County Prosecutor Peasley and State Prosecutor Davis. The United States Attorney's Office itself was not involved in the state prosecution.

The trial of Figueroa in the state court began in October 1989 and resulted in his conviction in December 1989. An officer of the Arizona Department of Public Safety, Gene Anderson, had conducted an investigation of Manuel Duarte, a customer of Figueroa's organization. Through Duarte, Figueroa allegedly supplied marijuana to one

Thomas Tighe. One of Tighe's workers, James Swazey, had agreed to cooperate with the DEA. At the state trial Swazey testified against Figueroa, as did Soto, and Gene Anderson interpreted the ledgers found in the original arrest and testified about their connection with Figueroa. DEA Agent Roger Wallace sat with the state prosecutor at the prosecution table to assist the prosecutor and was the designated government witness to whom the sequestration rules did not apply.

During the state proceedings AUSA John Leonardo requested a stay of the federal forfeiture action in order to prevent Figueroa from using that action as a means of gathering information that would be of help to him in the state prosecution. During the state prosecution John Davis discussed the case several times with AUSA Stevens. Either during the state trial or shortly thereafter Davis was appointed as a Special Assistant to the United States Attorney for the District of Arizona. Davis and AUSA Stevens are the prosecutors of Figueroa in the present case. Davis' appointment as a federal prosecutor states that Arizona is responsible for paying his salary. Gene Anderson, the state investigator, is the lead case agent for the federal prosecution.

ANALYSIS

That the United States can punish the same conduct already punished by one of the several states without violating the Double Jeopardy Clause was decisively established in *United States* v. *Lanza*, 260 U.S. 377, 382 (1922). That decision was reached at a time when the Double Jeopardy Clause of the Constitution was held to apply only to proceedings by the federal government. Since that date the Double Jeopardy Clause has been applied to the states. *Benton v. Maryland*, 395 U.S. 784 (1969). But nothing in this extension of the Constitution changed the *Lanza* rule. The proposition that the state and federal governments may punish the same conduct

has been reaffirmed. See *Heath v. Alabama*, 474 U.S. 82, 89 (1985); *United States v. Wheeler*, 435 U.S. 313 (1978); *Abbate v. United States*, 359 U.S. 187 (1959).

During the period when the question arose under the Due Process Clause rather than the Double Jeopardy Clause, the Supreme Court decided a case which, by analogy, is of great relevance here. *Bartkus* case has retained its vitality. *United States v. Wheeler*, 435 U.S. 313 (1978). Bartkus was tried and acquited in a federal district court of robbing a federally insured savings and loan association in Cicero, Illinois. The federal authorities were highly displeased with the result, and the trial judge upbraided the jury for its verdict. Almost immediately after the trial the federal authorities went to the State's Attorney and invited him to prosecute Bartkus. Less than three weeks after his acquittal Bartkus was indicted by Illinois and was subsequently convicted and sentenced to life imprisonment by the state.

In furtherance of the state prosecution the AUSA who had prosecuted the federal case had summoned to his office a co-defendant of Bartkus who had confessed his part in the robbery and testified against Bartkus in the federal trial. The federal prosecutor asked the co-defendant if he would testify against Bartkus in the same trial, and he said that he would. Sentencing of this man and another co-defendant, who also testified against Bartkus in both trials, was postponed by the federal court until they had testified against Bartkus at the state trial.

The FBI was also put to work to strengthen the evidence which had not sufficed to convict Bartkus in the federal trial. An FBI agent uncovered a new witness who testified at the state trial that Bartkus had told him about his participation in the robbery while they were both in jail awaiting federal trials. There was no contact between this new witness and any agent of the state of Illinois until the morning of the state trial. What his

testimony would be was known only through his arrangement with the FBI. Federal sentencing of this new witness for violation of the Mann Act was also postponed until he had testified against Bartkus at the state trial. The FBI agent also testified for the state in rebuttal of an alibi witness for Bartkus. And, over Bartkus' objection, the FBI agent remained in the state courtroom throughout the trial although other witnesses were excluded.

Writing for the Court and upholding Bartkus' conviction, Justice Frankfurter said that the evidence established "that federal officials acted in cooperation with state authorities." Such collaboration was "the conventional practice between the two sets of prosecutors throughout the country." *Id.* at 123. It did not offend due process of law. Justice Frankfurter added that the evidence did not show that the state "in bringing its prosecution was merely a tool of the federal authorities" and did not "sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution." *Id.* at 123-24.

The obiter dicta just quoted have been seized upon by criminal defendants like Figueroa in this case and argued that in theory such an exception does exist. *United States v. Bernhardt*, 831 F.2d 181, 182-83 (9th Cir. 1987). As a practical matter, however, under the criteria established by *Bartkus* itself it is extremely difficult and highly unussual to prove that a prosecution by one government is a tool, a sham or a cover for the other government. A comparison of the circumstances in *Bartkus* and the present case bearing on the federal-state collusion shows how difficult the proof is:

	Bartkus	*Figueroa*
Initiation of prosecution by one government at the request of other authorities	State prosecutes at request of federal authorities	State prosecutes at request of federal authorities
Federal agents used to assist state prosecution, including testifying at state prosecution	FBI Agent	DEA Agents
Presence of federal agent at state prosecutor's table	FBI Agent	DEA Agents
Federal provision of evidence to state prosecutor	Evidence presented by federal authorities in federal trial again presented in state trial	Evidence federally gathered provided to state before state trial
Federal sentencing power used to control state witnesses	Three prosecution witnesses' sentences so manipulated	At least Soto's sentence so used
Federal agent prepares key state witnesses	FBI agent prepares state witnesses	DEA agents contact state witnesses
Stay of federal forfeiture proceeding so as not to prejudice state prosecution	Not relevant	Forfeiture stayed
State prosecutor designated as special assistant to United States Attorney	Not relevant	Designation made
State agent used in federal trial	Not relevant	State agent is to be used
Federal prosecutor's salary paid by state	Not relevant	Davis' salary as federal prosecutor paid by Arizona

A review of these factors shows that the only differences between *Bartkus* and the present case are the stay of the federal forfeiture proceeding; the designation of Davis as a special assistant to the United States Attorney; the payment of Davis' salary by Arizona; and the proposed use of Anderson in the federal trial. None of these differences is significant. The federal proceedings should be stayed in order to help the state was already approved in *Bartkus* as to the sentencing of the state witnesses; the stay of the forfeiture proceedings was less important to the state than the control exercised over the witnesses through such federal stay of sentencing. The designation of Davis did not convert him into a federal official for all purposes. He could wear two hats. His primary role in the state prosecution as to the state prosecutor was not affected by a federal status that became significant only when he took on the federal prosecution of Figueroa. That his salary should be paid by the state while he prosecutes Figueroa federally does not change the fact that Davis now proceeds under Federal authority and acts as a duly appointed federal official. The use of Anderson in the federal trial is no more significant than the use of the FBI agent in Bartkus' state trial.

In *Bartkus* the federal government after losing its prosecution colluded closely with the state in securing a conviction. With the rhetorical bite that sometimes characterizes a dissent, Justice Brennan described what happened in these terms: "[T]he federal effort which failed in the federal courthouse was renewed a second time in the state courthouse across the street." *Bartkus*, 359 U.S. at 169 (dissenting opinion). Although *Bartkus* was decided under the Due Process Clause, it affords a potent analogy here. In the present case a state prosecution which succeeded has been followed by a federal prosecution for many of the same acts. What the dissenters in *Bartkus* refused to recognize and what Figueroa misses in his appeal is that the same acts may be punished by two sovereigns if they offend the laws of both sov-

ereigns. Due process of law is not violated when the defendant has violated the narcotics laws of the state and of the nation and is prosecuted for the same acts by both state and nation. *United States v. Lanza*, *supra*. Double jeopardy is not incurred by such serial prosecution. *See United States v. Wheeler*, 435 U.S. 313 (1978). As *Bartkus* makes plain, there may be very close coordination in the prosecutions, in the employment of agents of one sovereign to help the other sovereign in its prosecution, and in the timing of the court proceedings so that the maximum assistance is mutually rendered by the sovereigns. None of this close collaboration amounts to one government being the other's "tool" or providing a "sham" or "cover." Collaboration between state and federal authorities is "the conventional practice," 359 U.S. at 123. No constitutional barrier exists to this norm of cooperative effort.

The district court found Figueroa's motion to dismiss frivolous and dilatory. That ruling is not before us on this appeal. We, therefore, have no occasion to decide whether the rule established in *United States v. Dunbar*, 611 F.2d 985 (5th Cir. 1980) (en banc) should be applied in this circuit. *See United States v. Claiborne*, 727 F.2d 842, 850-51 (9th Cir.) *cert. denied*, 469 U.S. 829 (1984).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-10557

CT/AG#: CR-89-360-TUC-WDB

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JAIME FIGUEROA-SOTO,
Defendant-Appellant

Appeal from the United States District Court
for the District of Arizona (Tucson)

THIS CAUSE came on to be heard on the Transcript of the Record from the United Sttaes District Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 07/11/91

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CR-89-360 TUC WDB

U.S.A.

vs.

JAIME FIGUEROA-SOTO, *et al.*

HONORABLE WILL'AM D. BROWNING

(CRIMINAL MINUTES—GENERAL)
October 23, 1990

It appearing to the Court that the order on the ruling of the motions, dated October 18, 1990 inadvertently omitted a specific ruling on the defendants' motion to dismiss re. double jeopardy.

IT IS ORDERED that the motion is DENIED.

Filed Oct 23 1990

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-10557

DC# CR-89-360-TUC-WDB

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

JAIME FIGUEROA-SOTO,
Defendant-Appellant.

ORDER

Before: BEEZER, NOONAN and FERNANDEZ, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for reharing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Filed Oct. 3, 1991